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MEMORIAL

OF

HON. TH. H. BAIRD,

PRAYING

FOR THE ENACTMENT OF MEASURES TO PRESERVE

THE

CONSTITUTION AND UNION

OF THE STATES.

PRESENTED TO THE HOUSE OF REPRESENTATIVES, FEBRUARY 7, 1863, AND REFERRED TO THE COMMITTEE ON THE JUDICIARY.

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ERRATA.

Page 12, 6th line from bottom: read—who sat *in* court.

Page 16, 3d line from bottom: read—"Assiento contract" for *furnishing* negroes.

Page 20, 3d line from top: read—society *of* which.

5th line from top: read—it *is* the hope.

5th line from bottom: read—choose one *appraiser*.

NOTE.

The following Memorial was presented to the House of Representatives by Hon. Mr. Lazear, Feb. 7th, 1863, and was referred to the Committee on the Judiciary. No farther action having been taken upon the paper, and the position of its author having been misapprehended, it was, after the adjournment of Congress, withdrawn, in order that those of his friends who take an interest in the subjects it discusses might ascertain, by private perusal, the opinions it maintains. The result of this perusal has been a repeated request for its publication; and in deference to the wishes thus expressed, with the hope also that, even amidst the excitement and agitation of the times, counsels of moderation and regard for law as the only safeguard for our liberties, and the only method of restoring our beloved Union, may not fall unheeded,—the Memorial is now submitted to the judgment of the public.

MEMORIAL.

To the Senate and House of Representatives of the United States, in Congress assembled:

I desire to avail myself of my privilege as a citizen, respectfully to approach your honorable bodies, to ask such legislative action as may tend to adjust rightly our disturbed social affairs, and end the deadly strife that is now desolating our country.

With this view I beg to present some considerations, which I hope you will not regard as impertinent or obtrusive:—

We are fighting to maintain our *Constitution* and our *Union;* yet there is reason to fear that we may lose all that the Constitution was designed to protect, and all that makes our Union valuable.

Your present session is pregnant with consequences for *weal* or *woe;* and your proceedings must *heal* or *harm* the people you represent. Even *words* are *weapons*, when uttered in a legislative hall.

I pray you, therefore, as wise and patriotic statesmen, "to exercise with firmness and energy the constitutional powers with which you are vested;" but, at the same time, I beg you, in the very language of President Washington, "to mingle in the operations of government every degree of moderation and tenderness which the national justice, dignity and safety may permit." (Speech to Congress Dec. 8th, 1795.)

I suggest, however, *no concession to rebels in arms.* Many of our citizens have renounced their allegiance, and are "levying war" against their government; others are "giving them *aid and comfort.*" All of both classes are guilty of *treason*, and have incurred the penalty of the *law.* This must be inflicted upon them by the regular *prescribed* judicial process; but if the *baton* of the *Marshal* is too weak to arrest offenders, *bolls* and *bayonets* may be called to his aid,—in subserviency, however, always to the *civil authority.*

It is only the "free, able-bodied, white male citizens," constituting the "militia," that can be "called forth" to "suppress *insurrections.*" Foreign mercenaries, negroes, or savages, may not be used for such a purpose, against our own erring and deluded people. Our *force* should be mitigated by due forbearance and dignified conciliation; as chastisement to reclaim—not as vengeance to destroy.

The Constitution declares that "*The Congress* shall have power" "*to provide for organizing, arming and disciplining the militia, and for governing* such part of them as may be employed in the service

of the United States." It is, however, "*the militia of the* SEVERAL STATES" that is meant.

The President has no dominion, political or military, but what he derives from the Constitution, or what is vested in him by law. As the "executive," he may enforce the "rules and articles" enacted for the government of "officers and soldiers;" but he cannot *add* to them. He has no authority, at his mere *will*, under the pretext of "public necessity," to assert an emergent *sic jubeo*, and thus subject civilians to military sway. Our Constitution and laws preclude the exercise of such arbitrary control. No man can "be deprived of life, liberty or property without due process of law" and a "public trial by an impartial jury."—("Amendments," Articles 5th and 6th.)

We have no "martial law," distinctively so called, which can override the civil power and the established judicial administration. This despotic rule was forever "annulled" by Statute 17, Car. 1st.

Armies and navies do not, inherently, belong to our social system. They are the creations of Congress, and are supported and governed by positive legislation. The "commander-in-chief," as such, can do no valid act without a legal sanction; and a "proclamation" by him is a mere *brutum fulmen*, unless it is sustained by a *previous act* of the law-making power.

A distinguished writer says: "Proclamations have the force of laws: but *then* they are supposed to be *consistent* with the laws already in being; otherwise they are superseded."

Our Constitution and laws furnish no warrant for them; and such extreme executive acts generally do more harm than good. In a nation convulsed by civil strife, they tend to *strengthen rebellion into revolution.*

In 1775, Lord Dunmore, Governor of Virginia, in order to intimidate the disturbed people into submission, issued his "proclamation" *declaring martial law; freedom to the slaves, and encouraging them to rise against their masters.* It had, however, a contrary effect from the one intended. The public mind became greatly excited, and more fixed in the purpose of asserting independence. Bissett, the historian of the period, says: "Even well-wishers to the British government *censured* this proposition, as tending to loosen the bonds of society, to destroy domestic security, and instigate savages to the most atrocious barbarities."

The Governors of North and South Carolina (Mr. Murray, and Lord William Campbell) adopted similar plans of exciting the negroes to insurrection, and with like results. Such ultra schemes of aggression only produce violent resentment, without any benefit.

I think the character of our conflict with the Southern people, who are in revolt, is not understood or properly apprehended by our Commander-in-Chief and his subordinates. It seems to be regarded as a contest between two independent belligerent countries, in which *all* the inhabitants on both sides are necessarily in hostile position. The international laws and usages, as to *conquests, booty* and *cap-*

tures, are supposed to be operative, and all questions about them are to be adjusted when a *treaty* is made.

That is not our case. A *portion* of our people are in revolt; but all the residents of the disturbed region who are free from any traitorous participation are still *citizens*, and are entitled to all the protection that the constitution guarantees to their personal rights. We have nothing to do with booty, plunder and other belligerent contingencies. It is the *persons* of the rebels we pursue—not their *property*.

To admit that the "Confederate States," as they style themselves, form a separate *nation*, is to concede all that is claimed. We must then fight them according to the recognized laws of war, and we must make peace by *treaty*. Our Union cannot be so yielded. We must not *negotiate* with *traitors*. They must be brought back, and *punished*,—or *pardoned*, as may be thought right. No *terms*, however, can be offered.

In our penal process, the *law* of our *own country* is the only rule in our military operations and in all their issues. We have nothing to do with the international code, except, from considerations of humanity, to allow flags of truce, exchanges, &c. Congress has not "declared war."

Our army is a *conservative* force, analagous to a *posse comitatus* on a great scale. It is employed *in aid of the judicial power;* and is governed by congressional rules. The whole array must be composed of *equal members* of our political community. Consistently with freedom, *none others can be allowed to take part in our domestic quarrel.*

In the purer ages of the Roman republic, the *legions* consisted entirely of *citizens*. It was not until Cæsar determined to pass the Rubicon, in defiance of the Senate's decree, that the foreign element was introduced. He formed his "alauda," or "lark legion," of Gauls and strangers, and with their help became *dictator*. The lessons of experience are admonitory. The "Prœtorian guards" established despotism. (See 1 Gibbon, p. 106.)

In 1795, before President Washington "called forth" the militia to suppress the "Whiskey Insurrection," he was "notified" by a Judge of the Supreme Court that, "in the counties of Washington and Allegheny, in Pennsylvania, the laws of the United States were opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of the district. (See speech to Congress, Nov. 1794.)

Upon this judicial intimation, the President proceeded to exercise his function as "Commander-in-Chief." The constitutional "militia" were "called forth;" a Judge and Marshal approached the disturbed region, supported by *citizen soldiers*. Warrants were issued; *ring-leaders were apprehended, tried before a regular court and jury, convicted and*—PARDONED.

There was no *suspension* of the *habeas corpus*—not a single *mili-*

tary arrest of a citizen on pretense of the new crime of "disloyalty" or "sympathy;" there was no *pillage*, nor was any private property wantonly seized or destroyed. Thus was this alarming outbreak happily quelled.

It would rejoice every patriotic heart if our present social troubles could be soon terminated, and *cordial* peace restored. So desirable a result can only be attained by the prudent and judicious action of your honorable bodies. The supreme power is with you,—as representing the sovereignty of the people; and sad will be the day when you yield any portion of the radical empire entrusted to your charge.

War can never restore our country to its former condition, when a citizen of *one State* could feel himself *at home* in any other; it may compel a mere *acknowledged allegiance*, but rancor would still brood. What would *nominal* union be worth, if we must regard the people of the South as *conquered vassals* or *lurking traitors?* We cannot be really *united* States, unless the principles of our Constitution are maintained, and the rights of every citizen be equally protected. This depends upon the watchful care of Congress. Injudicious legislation ought to be avoided, and encroachments from any quarter firmly resisted.

There have been administrative acts calculated to increase irritation in the South, and that have given great dissatisfaction to loyal, conservative citizens. Some of them are *invasions* of *private rights* by executive officers of the Government. I will not remark upon *them*. When *wrongs* have been done by *individuals* having a "little brief authority," a legal remedy can be had. *Our courts are open and free.* No law, to *ratify or sanction* an outrage *already done*, can avail to protect the wrong-doer; because it would be *ex post facto*, and therefore prohibited by the Constitution. I leave such cases, therefore,—merely referring to the decision of the King's Bench, in "Sayre vs. Lord Rochford," the British Minister. (See 1st Bissett, p. 373.)

There are other matters, however, of the highest interest to our country and to the world, that claim your prompt and earnest consideration. Allow me to present them to your notice.

The Emancipation Proclamation of the President involves, in my opinion, more mischief than the burning of the Temple of Ephesus, which immortalized the incendiary.

I come before your honorable bodies to pray that by timely legislation this unwarranted executive act may be "superseded," and the threatened evils prevented.

If it is thought that this proclamation has any force as a *Government edict*, it would be very desirable that the question as to its validity should be submitted in some form immediately to the Supreme Court. It will no doubt, at a future time, if our Union is preserved, come before that tribunal; for men will not be stripped of their *property* without seeking redress. But if it could be determined *now*, it would be well, and might lead to safe adjustments.

If the measure has no legal foundation to rest upon, Congress cannot *confirm it, retrospectively*, so as to relieve from responsibility.

I think that no statesman can say that it *has* any authority; and that it tends to horrible evils, bloody history abundantly shows.

As a *political* measure, it has no legislative basis, and is therefore *unconstitutional*. The President cannot make a law; nor can Congress, *retroactively*, give the "force of law" to a proclamation that does not rest upon a *previous enactment*. It must therefore stand or fall upon its own merits.

It is equally baseless as a *military* order. The usages of war, between belligerents, have no application. The militia called forth to suppress insurrections form, as I have said, an armed "posse," in aid of the *civil* officer. Their duty is to *arrest* rebels, and bring them to justice. In doing this, if they find them in battle array, they may *shoot* them, but must not *plunder their houses*, or *burn their fences*. They are not employed to destroy or seize *property*, but to capture *persons* who are charged with *crime*. Everything belonging to a traitor is protected by law, until his person is apprehended, and he is tried and convicted by a court and jury. *Then only* does the question of *forfeiture* arise.

If it were granted, however, that the revolted region was a separate belligerent power, still I maintain that there would be no warrant for this proclamation. By the laws of war, as now held by civilized and enlightened nations, there is no plunder of private property allowed. Public stores, munitions, arsenals, and whatever may be used for defense or for annoying the enemy, *may* be seized, but individual rights are not disturbed. In the modern wars of Europe, armies bought and paid for their supplies, even in the enemies' country. (Vattel, page 452.)

If this proclamation takes effect according to its purport, our "Commander-in-Chief" may indeed say that his "pen is mightier than his sword." Although not a *conqueror*, he will be a greater *depredator* than any warrior from Nimrod to Napoleon.

I leave this matter to Congress. With your honorable bodies is the sovereign sway. If you cannot *restrain*, you have the constitutional power to *punish* the despotic action of the executive. I ask, however, no harsh rebuke for what may have been well intended; but only beg, on behalf of *humanity* as well as *policy*, that, by *resolution*, you supersede the Emancipation Proclamation.

There is another particular—of great national concern—to which I would now ask your attention. It is a *government act*, and binding upon every citizen, unless repealed, or declared to be unconstitutional by the Supreme Court. I refer to what is called the Confiscation Law. It is entirely within your control; and I will examine it freely, but with proper deference and respect.

This enactment takes from the supposed rebel, and *from his children*, by a proceeding *in rem*, without a regular trial by jury, all his *property*, and puts it into the *treasury*. If it were within the *granted* power of Congress, still it would be a severe penalty, and

not calculated to produce the desired effect. We are endeavoring to bring back our revolted fellow-citizens to their allegiance; but, in our discipline for this purpose, we ought not to let *resentment* be fomented into *rancor*, nor allow *vengeance* to overstep the bounds of *Christian humanity*. Our Union and Constitution are assailed, and we are struggling to preserve them; but, in doing so, we ought to be careful not to *violate*, in any degree, the great principles upon which our social fabric rests. Wayland says: "The cheapest defence of nations, I suppose to be the exercise of justice and benevolence." This is certainly true.

Hereditary punishments are contrary to the law of God, and repugnant to the best feelings of our nature. Because a man commits a crime, shall his wife and his children be reduced to indigence? That is the question which I present to your consciences, and your sympathies, as husbands and fathers.

Crime is personal: "The soul that sinneth, it shall die." But what further saith the divine law? "The son shall not bear the iniquity of the father." (Ezekiel, 18:20.)

History shows that, in every age of the world, confiscations have been the expedients of despots to fill their coffers. The first case upon record, perhaps, is that of Naboth, who was stoned to death in order that Ahab might have his vineyard. "I thought," says Bishop Burnet, "it was neither just nor reasonable to set the children begging for their father's faults. The Romans, during their liberty, never thought of carrying punishments so far. It was an invention under the tyranny of the emperors, who had a particular revenue called the *fisc*, and all forfeitures were claimed by them, from whence they were called 'confiscations.' It was never the practice of free governments."

The monster Caligula was the first of the Roman emperors who practised this system of plunder. It is said "he oppressed the province of Gaul with enormous exactions and confiscations, in order to fill his exhausted treasury." He also, as an instrument of tyranny, introduced "martial law," and "substituted military execution for legal punishment."

When the "northern hordes" of armed despots and slaves overran Europe, this system of *plunder*, under the pretext of *punishment*, was universally practised. It passed into England, where it was continued during the Saxon period, and became a part of the feudal law.

Judge Blackstone intimates that the reason of any forfeiture for crimes is that *all property* belongs to the *crown*, and is only *loaned*, as it were, *upon good behavior;* and that when an individual does wrong to his lord and master, he loses everything that he has only enjoyed by kind sufferance.

This *flam* has no meaning here. *Our lands are allodial.* We have no "superior lords." Whatever a man has, belongs to him and his heirs.. We have retained the phrase "fee simple," but it everywhere in our country means *an absolute estate of inheritance.* Per-

sonal property of all kinds, also, by the laws of every state, at once vests in his children at his death, unless disposed of by will.

Under whatever pretence, confiscations, by judicial proceedings or parliamentary acts of attainder, were continued in England until the reign of Queen Anne, when a statute was passed (17 Anne, ch. 21) declaring that "after the decease of the late Pretender, no attainder for treason should extend to the disinheriting of any heir, or to the prejudice of any person other than the traitor himself."

In framing our Constitution, this humane and just principle was adopted; and *hereditary punishments* are forever abolished in our free country, by a fundamental law.

This detestable expedient of tyranny has in fact been banished from all Christian communities, by enlightened, philanthropic policy; and we must look for its abiding home in eastern despotisms. Gmelin, in his "Travels through Persia," says: "Even now, in the Turkish empire and in Persia, the property of great men who are executed falls to the public treasury, or the governors of the province *seize* upon it. The Chans now enrich themselves with the *confiscated* property of criminals, and other fines," etc. I will only refer to James II. and the French republicans in the Reign of Terror, *in memoriam*. Our Constitution declares that "no bill of attainder or *ex post facto* law shall be passed;" and that "no attainder of treason" (upon judicial trial) "shall work corruption of blood or forfeiture, except during the life of the person attainted."

In my opinion, the late "Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, &c." is in *direct violation* of the constitutional provision. Its purpose is to take the estate of the alleged traitor from his children, and put it into the treasury—not until the death of the accused, but forever.

This is to be effected, too—not upon a regular trial by a court and jury, when the party charged shall be present, and "be confronted with the witnesses against him"—but in his absence, before a summary tribunal, and by a proceeding *in rem*.

This, it is said, is to "punish treason and rebellion." The Constitution declares that there shall be "no forfeiture" *except for life*. The late act makes the confiscation absolute and without limit. Can there be two penal inflictions for the same offense? or can there be two modes of proceeding—one under the constitution, and the other by this process *in rem?* If so, there might be very embarrassing results. A man might be "proclaimed" under this Act of Congress, and, upon his default, he might be condemned and his property confiscated: he might afterwards appear, demand a trial before a jury, and be acquitted. In such a case, what could be done to restore his violated rights?

It cannot be. There is *one* mode by which the guilt of treason can be established: a regular trial before a court and jury, as the constitution prescribes;—and there is none other.

Judge Story says: "By the *common law*, one of the regular in-

cidents to an attainder for treason (that is, to a conviction and judgment in court against the offender) is, that he forfeits all his estate, real and personal. His blood also is corrupted; that is, it loses all inheritable qualities, so that he can neither inherit any real estate himself, from any ancestor or relation by blood, nor can his heirs inherit any real estate from him or through him," &c. "Thus innocent persons are made the victims of the misdeeds of their ancestors, and are punished, even to the remotest generations, by incapacities derived through them. The *constitution* has *abolished this corruption of blood, and general forfeiture*, and confined the punishment exclusively to the offenders; thus adopting a rule founded in sound policy, and as humane as it is just."

It is clear, then, that children cannot be deprived of their inheritance because their fathers have been guilty of treason. Nor can there be a conviction of that, or any other crime, (except in the case of the President and other civil officers of the United States), unless by a regular judicial proceeding before a constitutional court and jury.

Congress cannot declare any citizen a traitor; nor can it create any special tribunal to examine *ex parte* testimony, and condemn to confiscation by a proceeding *in rem*.

By Act of April 30th, 1790, even a rebel convicted by a jury and sentenced by the court, is not divested of *any* portion of his property. It is: "*Provided, always*, That no conviction or judgment for any of the offences aforesaid, shall work corruption of blood or any forfeiture of estate." Treason is one of the crimes enumerated. This, however, is an act of legislation. It may be changed, and a "forfeiture" declared for the life of the offender, but no longer. Unless the late Confiscation Law operate a repeal, this provision is still in force. I think, however, the Confiscation Act is *void;* and at all events, it can have no *ex post facto* validity.

It has been said there is no conflict with the constitution, because Congress does not "forfeit" the property of rebels, but "confiscates" it. I will not insult your honorable bodies by the suggestion that there was any intention to cover a great wrong by a mere verbal distinction without a difference. I believe there has been *haste*, perhaps *heat*, and inadvertency, and that when the matter is examined all will be set right.

The words "forfeiture" and "confiscation," in the sense of penal inflictions, are synonymous. They both signify the loss of property as a consequence of crime. The first, in its derivation, intimates that something has been done "out of rule" or contrary to law; the other expresses only a putting into the *fisc* or treasury. In its origin, however, it had a much severer meaning. Suetonius (in "Caligula") says: "*Confiscare est in publici ærarii jus redigere; non solum de bonis, sed etiam de hominibus, dicitur.*" Not only goods but men were seized. Littleton defines it: "To seize as forfeit to the king, also to arrest or seize on a man's person, and turn him over to the exchequer." It has always been a tyrannic expedient, by which

the people have been plundered in order to pamper parasites. Until recently the very term was not known to our laws. We have it in history, and in our dictionaries, but it does not appear upon our statute-books prior to this unhappy rebellion. Even the word "forfeiture," though used in the constitution, and in the law of 1790, is not in any acts of Congress except those relating to revenue and the collection of duties; and in these, where *personal* delinquency is involved, the expression "fine" is employed to denote the penalty. This is a pecuniary *mulct*, and is in the true nature of punishment, because it imposes privation and suffering upon the guilty party. Nor must there be "excessive fines" to impoverish a family.

As a *civil* law, then, I claim that the Confiscation Act is unconstitutional, and therefore void.

But as a *war measure*, has it any legitimate force? I say, it has not,—as I will show.

If our present conflict were strictly belligerent, confiscation of private property, not actually captured, would not be within the range of military law; and it would be directly opposed to modern usage. By the "Rules and Articles for the better Government of the Troops of the United States," "any offense against the persons or property of the good people of any of the United American States" is expressly prohibited. (See 10th Sec., Art. 1st.)

All "public stores taken in the enemy's camp, towns, forts or magazines, whether of artillery, ammunition, clothing, forage or provisions, shall be secured for the service of the United States." But "whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses or gardens, corn-fields, enclosures or meadows," &c., "he shall be punished according to the nature and degree of the offense." (Sec. 13, Art. 16.)

And "if any officer or soldier shall leave his post or colors to go in search of plunder, he shall, upon being convicted thereof before a general court-martial, suffer death, or such other punishment as by a court martial shall be inflicted. (Sec. 13, Art. 21.)

Destruction or pillage is never allowed, "unless by order of the Commander-in-Chief of the forces of said States, to annoy rebels or other enemies in arms against the said States." (Secs. 13–16.)

All military interference with the persons or property of citizens not actually "levying war" is forbidden, unless there be a present hostile array that, in the opinion of the General, may require such extreme action in order to their discomfiture.

In the late unhappy affair at Fredericksburg, it was *justifiable*, perhaps, to shell the brick houses that covered the rebels, who were firing upon our men; but it was *wrong* to plunder the dwellings in the city, after it was taken.

There is nothing that falls, properly, under the military regime, but what is connected with open, manly warfare. We are not to excite servile insurrections, and massacres, and murders and burnings; nor ought we to take from innocent wives and children their means of subsistence, by confiscations. Let us subdue the rebels

by *arms*—not *intimidate* to submission, by acts that violate humanity.

Tiberius nobly replied to an infamous proposal of the Prince of the Catti, "that the Roman people chastised their enemies by open force, without having recourse to wicked practices or secret machinations." Our enemies, at present, are our *fellow-citizens*. "Let us not forget that—*they are men*. If we are under the necessity of prosecuting our rights by force of arms, let us not destroy that charity which connects us with all mankind." (Vattel, 427.)

I admit that in our Government the legislative department is supreme, but still it is limited. "Congress," said Mr. Henry, "by the power of taxation, by that of raising an army and navy—and by their control over the militia—have the sword in one hand, and the purse in the other." There is, however, a higher authority. The people, in the Constitution, have retained rights that must not be violated. Among them are personal liberty; private property; freedom from arrest, unless upon judicial warrant; trial by a court and jury in all cases of alleged crime, "confronted with the witnesses;" and "no forfeiture except during the life of the person attainted."

Congress can pass no confiscation law, nor fix the guilt or consequences of crime upon any citizen—even a rebel—by an *ex parte* proceeding *in rem*. Religion, justice, humanity and true social policy are opposed to such extreme measures.

Nicodemus saith: "Doth our law judge any man before it hear him, and know what he doeth?" And in Paul's case, Festus told the malignant Jews: "It is not the manner of the Romans to deliver any man to die" before that he which is accused have "the accusers face to face, and have license to answer for himself concerning the crime laid against him." (Acts, 25:16.)

Confiscations and attainders have been dreadful instruments of tyrrany. I will only refer to the Norman Invasion, the reign of Henry the Eighth, the civil wars between the houses of York and Lancaster, and the rebellions in Ireland, to show their devastating effects.

Yet even in all this period, where there was a free and calm exercise of judicial power, they were condemned. William the First claimed all England by *conquest*. His good feelings revolted at the hereditary punishments he had inflicted. A case occurred in which he decided against his own arbitrary act. Sherborn, an English gentleman, was owner of a castle and lands in Norfolk. The "Conqueror" gave the estate to one Warren, a Norman, who took possession. The son of the rightful proprietor, when times became quiet, claimed as heir-at-law; and upon full trial, in presence of the king, who sat at court, it was decided that the confiscation and grant by the Conqueror were *void*, and that the claimant was entitled to his inheritance.

The numerous *bills of attainder*, too, passed by the parliament, have generally been repealed, and the property restored or compensated. They are now in disrepute and disused.

Our Confiscation Law is, in character and effect, a bill of attainder,—and, therefore, prohibited by the Constitution.

There is one feature in it that is objectionable, even beyond the divestiture of property,—because it tends to make households the scenes of outrage and blood.

The slaves of rebels are declared *confiscate;*—not, as in Caligula's time, to put them into the *fisc*, or strong box; but *to set them free.* If it were conceded that Congress has power to confiscate the property of citizens charged with treason, by an exparte proceeding *in rem*, without trial by jury, still I claim that they *cannot declare emancipation.* This has been determined by the Supreme Court,—by the *Executive*,—and by a deliberate and almost unanimous vote of the House of Representatives.

On the 11th day of December, 1838, Mr. Atherton, of New Hampshire, offered a series of resolutions. The first was in these words: "*Resolved*, that this government is a government of limited powers; and that by the Constitution of the United States Congress has no jurisdiction whatever over the institution of slavery in the several States of the confederacy."

This resolution was carried by a vote of, yeas, 198—nays, 6. (See Journal.) There never was a clearer expression of legislative opinion on any subject.

It is true that Congress has since set free the slaves in the District of Columbia, in violation of the acts of compact, but it is my opinion that if the question is ever presented, the Supreme Court will declare the whole action *unconstitutional and void.*

I claim, then, that if the property of rebels may be confiscated, yet slaves cannot be set free. If Government *take* them from their masters, it must assume all the obligations that the relation of slavery, by law and usage, has fixed upon the owners,—in case of old age, decrepitude, disease and helplessness.

Montesquieu says: "The magistrate ought to take care that the slave has his provisions and clothing; and this ought to be regulated by law." "The laws ought to provide that care be taken of them in sickness and old age." (Vol. 1, page 289.)

I believe that in all the Southern States the masters are required to *keep* their negroes when they become unfit for service. A *forfeiture*, of course, discharges them from this liability, and our Government is bound to assume the obligation. They cannot be turned loose to maraud or perish. Our officers, it seems, have a proper sense of duty in this matter, and thousands of "contrabands" are now supported at the public expense. If their number is to be greatly increased by the President's Proclamation, or by the proceedings *in rem* under the Confiscation Law, it becomes a matter of great concern to the people. How are they to be disposed of? Unless they are *property*, our measures operate no *divestiture;* and if they escape, and our Government refuses to execute the Fugitive Slave Law, they will spread over the land as paupers and pillagers. Should we recognize them as "chattels," or as anything having

ownership, and declare them forfeited, we must take care of them, and provide for their wants: *they belong to the nation.* Should we keep them, and make them work, our Government would become a slaveholder, on a grand scale; if we sell them, and put the "price of blood" into the treasury, we fix, indelibly, the national seal in approbation of slavery.

But it matters not in what way they are disposed of, the heirs of convicted traitors will, under the constitution, have a claim for the value of their lost servile inheritance. (See Amendments, Art. 5.)

This subject, then, is one of great interest, and demands the gravest consideration. The legal and political condition of the negro slaves in the rebel states ought to be well understood. I fear it is not.

Slavery is an old "institution" among men. It began soon after the deluge, when the curse was pronounced upon the descendants of Ham: "A servant of servants shall he be unto his brethren." In the Hebrew language, the word *Ham* means burnt or *black;* and it is wonderful how the malediction has followed the *colored* race in all ages of the world.

The early Egyptians had slaves, at the time their first history begins. Hagar was given to Sarah as a handmaid, and her dominion over her was absolute. Abraham was a large slaveholder, and so were Isaac and Jacob. It subsisted among the Israelites, and just laws were adopted, or given by divine authority, for their government. (See Paxton's Illustrations, 2d vol. p. 385.)

In Homer's time, slaves were common in Greece; and at a later period, in Athens, there were only twenty-one thousand citizens, and four hundred thousand men, women and children in actual bondage.

The Romans had slaves called "servi," from *servare;* being captives taken in war, and not *killed* (as the conqueror had a right to do) but *saved*, as the word means, to yield money either by their labor or by their prices when sold.

By the civil law, the power of making slaves is regarded as a national right, and follows, as a natural consequence, from war. "*Jure gentium,*" says Justinian, "*servi nostri sunt, qui ab hostibus capiuntur.*"—("By the law of nations, those who are taken from our enemies are slaves.") The supply from the Roman wars was very great. Plutarch says that at one time, in the camp of Lucullus, a slave was sold for four drachms, or three shillings sterling.

But the relation existed in every age and in every country. At the very time the sturdy barons extorted from King John, at Runnymead, the acknowledgment of *their* rights, perhaps two-thirds of the people were in bondage. Nothing was said in the Magna Charta about "liberty and equality" to *all men.* In fact, the "villeins" or *slaves* were not considered as having any privileges; they were regarded as *property*, and were sold with the land at the end of the tenth century.

A law of Ethelred fixes the prices of certain articles, as follows:

"Of a *man* or *slave*, a pound; of a horse, thirty shillings; of a mare or colt, twenty shillings,"—and so on through many different items.

I must, however, pass over a great deal of curious historical detail, and come to the particular case of the negroes.

"Slavery," says the writer of Universal History, "is indigenous in Africa. In Loango, and in many other nations, all the common people are slaves. But, what is worse, they are cannibals. Human flesh is eaten on the western coast of Africa, and is offered to their idols." Dr. Oudnay says: "The wells are generally surrounded by the bleached skeletons of slaves, who had been left to perish there by their masters." The chief worship of the Giagas consists in frequent sacrifices of human victims, particularly children. Captives taken in war were always devoured, or immolated to appease their deities. "*In such a country,*" says a writer, "*slavery is a deliverance.*"

The fact is that *humanity* first introduced the negro into Europe. This may be denied, but history proves it. When the Portuguese erected their first fort at Elmina, in the year 1481, they found that, in various ways, the great part of the people of the interior were in a state of cruel bondage. Some were born in that condition; some had sold themselves, their wives and children, as was the custom; others were so punished for crimes, or for a kind of pretended witchcraft called *obi;* many passed into servitude for debt; and prisoners were slaves by right of war. (See, also, Wilberforce's 12 Propositions.)

The Europeans, having found out the African chiefs, made a treaty with them, in which it was agreed that the kings on their part should, from that period, sentence prisoners of war and convicts to servitude with the whites; who, on their part, engaged to furnish, in exchange for them, the luxuries of the north.

This contract, which took effect immediately, was the foundation of the slave trade. Spain soon engaged in the traffic, and negroes abounded in that kingdom.

In 1552 and 1557 expeditions were sent out from England, under Sir John Hawkins, and it was said that Queen Elizabeth was a partner in the concern.

Mr. Bancroft says that John Smith, of Boston, and Thomas Keyser, first brought the Colonies to regard slavery. In 1654 they imported a cargo of negroes to Massachusetts. At first the enterprise was denounced, and the guilty men were punished. The legislature ordered the slaves to be restored to their country, at the public expense. At a later period, however, both *Indians* and *negroes* were brought into the state in bondage, and the trade was greatly extended.

Soon after the first settlement of James river, in Virginia, a Dutch ship landed twenty negroes, and sold them. This was the beginning of slavery in the *Southern* colonies. The early settlers in all that region struggled nobly against it. Georgia was earnest in

opposition, and the House of Burgesses of Virginia passed no less than twenty-three acts for the suppression of the slave trade, which were *negatived* by the king. The commercial class took hold of the matter, and the "institution" was established. *Old* and *New* England engaged extensively in the detestable traffic. As there was no marriage among the blacks at an early period, the civil law rule, "*Partus sequitur ventrem*," (The child follows the condition of the mother), was universally adopted. All born of slave women were slaves. The number increased rapidly; in 1790 there were 697,897, —extended over all the states except *two*. There are now between four and five millions,—confined mainly to the country south of Mason & Dixon's line. What must be done with them? is the interesting question.

This matter ought to be examined calmly, in the light of truth and policy.

If slavery is an evil, the people of the South did not originate it. They found it as it is, and think it is beyond their control, unless by encountering greater mischief. Perhaps the *trade* was commenced by Massachusetts, who took as prisoners many Pequod Indians, and sold them in the West Indies. This was in 1637; but New England had slaves before this: for the "Confederation of Massachusetts, New Plymouth, Connecticut and New Haven," in 1643, when they formed their articles of union, established the first fugitive-slave bill that ever was enacted. In the eighth article is the following provision: "It is agreed that if any servant run away from his master into any of the confederate jurisdictions, that in such case, (upon certificate from one magistrate in the jurisdiction out of which said servant fled, or upon other due proof), the said servant shall be delivered to his master, or any other that pursues and brings such certificate and proof." (1 Pitkins, 477.)

The first fugitive-slave bill, too, which was before Congress in 1791, was reported by Mr. Bourne and Mr. Sedgewick, of Massachusetts, and Mr. White, of Virginia. It was a similar act sent from the Senate, however, that was passed in the House on the 5th February, 1793, and the vote stood yeas 48, nays 7,—every member from New England but *five* voting for it. It was, therefore, a *Northern measure*—honorable to the men who were determined to fulfil the compact fairly made.

I make these references merely as intimating a suggestion that "hard words" on this subject, coming from a particular region, are unsavory, and not altogether just. Let them "that are without sin cast the first stone." Criminations and recriminations are idle and mischievous. They lead to rancor, and not to peaceful adjustment. *We have slavery*, and—at least since 1713—by an authority that the colonists could not control. In that year, by the Treaty of Utrecht, between Philip the Fifth, of Spain, and Queen Anne, of England, the "Assionto contract" for punishing negroes was committed to the South Sea Company just then established. This gave full license to the trade, and "the *contraband* commerce was carried

on with a facility and to an extent unknown in any former period." (See Robertson's History of America, vol. 3, p. 271.)

In fact, negro bondage has always been legitimated by governmental authority, in this country, before the Revolution, and it is *recognized* by the Constitution of the United States. To speak of it, therefore, as a *crime* against the laws of God and man, is unprofitable. We may all regard it, in the present age of Christian humanity and progress, as a *social evil*, which ought to be removed, by common consent, in a manner consistent with private rights and sound, just policy. In my opinion, *we can never have a cordial, trustful peace and union again until this disturbing element of discord and strife is happily settled.* Can this be done? I think it may; and I beg leave to present to your honorable bodies a plan for your consideration.

First, however, let me say *how it cannot be done.* I say, then, that slaves cannot be freed by an executive proclamation, not sustained by previous legislative warrant. Such an act would have no authority, and ought to be superseded. Any subsequent ratification would be *ex post facto*, and therefore unconstitutional.

They cannot be freed by "martial law—which is *no law*," and therefore does not exist in our country: it is military despotism. They cannot be freed under the "Rules and articles" made "for the better government of the troops;" for those only operate upon "officers and soldiers."

They cannot be taken as *booty*, and set free: there is nothing that, by the laws of war, is regarded as booty, pillage or plunder, except that which is seized in the strife of arms. This does not change ownership; and as slaves can always be identified, the master, if he can recover them, has still, by the law of *post liminium*, his right of property complete. (See Vattel.)

In the War of 1812, the British army deported a great many slaves from the Southern States. Our Government claimed indemnity, and actually received, in the year 1827, through the mediation of the Emperor of Russia, $1,204,960, for the benefit of the claimants.

The time *may come* when the justice of Congress will *compensate* for the "contrabands" that are now fed at public cost.

I say, further, that slaves cannot be set free by an act of confiscation. Congress can, by law, declare that the property of rebels shall be forfeited during life, but it cannot forfeit the property of a single one of them by an *ex parte* proceeding *in rem.* It can only be done upon a regular trial before a court and jury. So is the Constitution.

Finally, as to these negative suggestions, I maintain that although slaves can only be freed by an act of manumission, yet the *masters* cannot do *that* without the consent of the *bondmen* themselves, either expressed or implied.

This may seem strange, but the *law* is so, as will appear by a little examination.

Slavery is a compulsory relation, yet there are mutual and reciprocal obligations.

The master, by the laws of the several states, and by recognition in the constitution of the United States, has a *right* to the "service or labor" of his slave; which he may coerce by such discipline as a man may use with his son in his minority, or with his apprentice. But, on the other hand, there is a corresponding obligation on the master, in conformity with the law of the land, to find his servant in food, raiment, fuel, medicine in sickness—and whatever is necessary to his health.

He cannot relieve himself from these duties by saying to his old, infirm or decrepid slave—"go, you are free."

If the master, however, is discharged from these duties by a constitutional, governmental act, the nation must bear the burthen.

It is my opinion, upon careful examination, that "proclamations of emancipation" are only mischievous;—and that *confiscation, or forfeiture of slave property*, is not within the range of military law. I believe, too, that Congress cannot free a single slave without violating our written charter.—Yet I am fully convinced that a plan may be devised to remove the incubus of slavery and restore our great country once more, to peace and harmony. It requires, however, *unanimity* among leading politicians, in order to secure the concurrence of all the people. Suggestions that may lead to so happy a result ought to be received kindly.

As a matter of deep concern and common interest, I beg leave to present some views on this subject. Before doing so, however, I would say that I think the people of the North and the South have greatly misunderstood one another on the slavery question. The greatest and the best men of the southern section of our country have been opposed to the system of bondage, and have anxiously desired to have it safely removed. I could refer to the writings and speeches of Washington, Jefferson, Henry, Tucker, Harper, Mercer, Gaston, Drayton—and a host of statesmen in proof.

I can say also of the people of the North, that, although there are enthusiasts among them, who would derange the system of the universe, in order to carry out their wild and impracticable scheme of abolitionism,—yet the great part of the population is influenced by a desire to do what is true and patriotic, by a just and honorable process. Why cannot good men meet on a common platform of christian philanthropy, and act together? I appeal to all such. Religion and humanity need not disregard prudence and policy.

It was a movement in Virginia that originated the colonization society. I regard this as the best scheme that ever was devised for the future welfare of the black race of our country; and perhaps it may prove the greatest *missionary enterprise* that has ever been since the days of the apostles.

It is nearly a year since I submitted to the President a plan of voluntary manumission,—referring to the colony of Liberia, as a *happy home* for our civilized, and, to some extent, christianized

blacks. I requested him, if he approved, to present it to your honorable bodies, for your consideration.

He did not think proper to notice it; but has since offered some views of his own, with like object. I concur with him heartily in the *principles* he asserts, and only differ with him as to the *constitutionality* and *practicability* of the measures to carry them out. He proposes *gradual emancipation* with the *consent of all concerned; compensation to owners*, and the *purchase of a territory*, to which the blacks may remove and hold, as their country.

I object to this plan *only* because it *cannot be operated successfully*. My reasons I will briefly give.

1st. The owners of slaves, holding them under the law of the land as *property*, will never consent to relinquish them *without equivalent*.

2d. The people, in addition to our war debt, may not be willing to have their future means, and that of their children, charged with the principal and current interest of an immense sum, the price of slaves.

3d. *Congress has no power to create such national liability.* Their power to *tax* is defined and limited. The President proposes to call a *convention*, to amend the constitution, so as to embrace the objects contemplated. In our present social condition this would be *unmooring our national vessel in a stormy sea, and the end might be shipwreck.* I leave this however to the wisdom of Congress.

4th. The President seems to repudiate the colony of Liberia, and contemplates buying a new home for the blacks in the isthmus between the two American continents.

This plan was submitted to your honorable bodies many years ago, and I will adopt, as my own insuperable objections, the reasons given in a report of the committee of the House of Representatives on the 11th February, 1817, (see Journal.) I will quote only a single passage, but ask that the whole may be examined.

"Every new territory established by our government, constitutes indeed a colony, formed with great ease; because it is only an extension of homogeneous settlements. But in contemplating the colonization of the free people of color, it seems obviously necessary to take a different course. Their distinct character and relative condition, render an entire separation from our own states and territories indispensable. And this separation must be such as to admit of an indefinite extension. Hence it seems manifest that these people cannot be colonies within the limits of the United States. If they were not far distant, the rapidly extending settlements of our white inhabitants would soon reach them; and the evil now felt, would be renewed, probably with aggravated mischief."

Again. "Turning our eyes from our own country, *no other*, adapted to the colony in contemplation, presented itself to our view, nearer than Africa, the *native land of the negroes;* and probably that is the *only country* on the globe to which it would be

practicable to transfer our free people of color with safety and advantage to themselves and the civilized world."

This report led to the establisment of the colonization society, os which Judge Washington of Virginia was the first president. Its progress and its prosperity have exceeded all expectation, and it if the hope of the christian and philanthropist, for the vast continent of Africa, now in heathen darkness and savage barbarity.

Without further remark as to the presidential plans, which I only oppose because they are impracticable, I beg your permission to offer my own scheme. Let me premise, however, that in the extinction of slavery or the process of colonization, by any *direct* exercise of *power*, the general government cannot control. Congress, however, can "dispose of the public lands" ad libitum and without any constitutional restraint. It may appropriate them so as to promote the general welfare, by removing a constant source of irritation, jealousy and distrust. In this way only I ask its aid. I call for no exercise of doubtful authority. If the measures I propose will not tend to restore UNION (with harmony and confidence) to our now disturbed country; if it will not make our social institutions more stable and secure, advance the wealth and prosperity of the whole nation; and in every way increase the happiness of the people, I will consent to abandon the project.

It is, however, my decided conviction that in all aspects and influences, the results will advance the common good and that, in any event, the measure I urge will show that the *government* aims to carry out the honest desires of the whole nation by just, fair and practicable means. With these views I proceed to offer

A PLAN FOR THE EMANCIPATION OF THE COLORED RACE.

First. I propose that Congress direct the unsold *public domain* to be surveyed into tracts, in the usual manner; causing each subdivision to be valued, according to its quality, in reference to its *soil*, *locality*, *mines*, *timber*, *water* and other natural advantages; all which particulars shall be recorded in books to be provided, and kept in convenient places, for examination, by all who may be interested.

Second. Whenever any owner of slaves shall determine to manumit them, upon the condition that they *consent* to go to Liberia, he shall make his intention known to the officer who may be appointed by the government to attend to the business; and thereupon measures shall be taken to have the said slaves valued. To effect this the owner of the slaves may choose one appraised, and the officer of the government another.

Third. When the valuation is made, the owner of the slaves shall receive for the amount, *land scrip*, which he may locate in any part of the United States, where the public lands are surveyed and

valued; *leaving every alternate tract to the government, for sale at any subsequent period, in the usual manner.*

Fourth. That as soon as the colonization society shall secure to each adult male, so manumitted, 160 acres of land in Liberia, the President of the United States shall cause the said slaves to be conveyed to the places designated; and for this purpose the public steamships or other vessels may be employed.

Fifth. The government will provide for the said slaves one year's subsistence, and will also furnish suitable agricultural implements, &c., so as to enable them thenceforward to support themselves and their families by their own industry.

Sixth. The colonization society and the local government of Liberia, are to be *parties* in all the arrangements; and to give their hearty aid and co-operation to effect the objects.

This is the action I propose on the part of the National Administration. There is nothing coercive. It merely offers to apply, as a measure of "general welfare," the public lands, to pay a reasonable compensation to those who, yielding to common feeling and sentiment, consent to manumit their slaves. *This is but just.* Popular movements have interfered with the owner's quiet enjoyment of his slave property, and have rendered it insecure. The loss he incurs, therefore, by giving them freedom, ought to be borne by the nation, and discharged out of the "eminent domain."

What I thus desire from Congress is entirely *inductive*. It merely promises to the owner of slaves, who may be influenced by humanity or common sentiment to set them free, *their fair value in land to be selected by himself.* But, if the proposed enactment is supported and carried by *Northern* members, it may convince the rebels that there is no disposition to do them wrong in that much-abused section. Perhaps it may induce misguided men to pause in their mad career, and reflect upon their course. If they would do so, they might arrive at the happy conclusion that emancipation is not only a duty, but is really their highest interest. I firmly believe that Southern lands, under the power of free labor, might be made to produce double what they will do under slave culture. This question, however, I do not mean to discuss at present; but only intend to say, that if kind feelings and good opinions could be entertained by slaveholders —and all of us—it would do what war never can effect: restore true union, harmony, and general prosperity. It would soon remove, too, the great root of bitterness, by a co-operative effort to extinguish bondage in the only way by which it can be fully and finally effected. This must be by *state laws*, passed by the representatives of the owners of slave property. Initiatory steps—to be binding—must originate in the very region where the mischief exists. Congress cannot interfere, unless by a recommendatory resolution.

I propose, then, as a *suggestive* part of my plan—

First. That each slave state pass a law providing that, as soon as the other states and the United States adopt corresponding measures,

then the rule of the civil law—that the children of slaves follow the condition of the mother—shall be abolished, and that slavery by birth shall no longer exist. I do not ask for compulsory emancipation. I leave it optional with owners to accept or reject the offer which I pray Congress to make; but I wish that all born after the law I have proposed, shall be free, as God and nature intended.

This is the primary movement, and strikes at the very foundation of the "institution." It is within the constitutional powers of the several state governments, and interferes with no subsisting right. *No man can claim property in that which is not in being.* Such a law, therefore, would be no greater exertion of legislative authority than is often exercised in adjusting the rules of policy in regard to estates both real and personal.

The very measure I propose was adopted by Pennsylvania, and the validity of the enactment was never questioned.

By the third section of the Act of 1780, it was declared that "all persons, as well negroes and mulattoes as others, who shall be born within this State, shall not be deemed and considered as servants for life or slaves, and all *servitude for life, or slavery of children*, in *consequence of the slavery of their mothers*, in the case of all children born within this State, from and after the passing of this act as aforesaid, shall be and hereby is utterly taken away, extinguished and forever abolished."

This act made Pennsylvania a free state; and such a law I believe every legislature has constitutional power to pass. The process is not direct or immediate freedom to slaves—which can only be by the voluntary act of the master—but it strikes at the root of the social evil, and will, after some time, remove it forever, without impairing any right of property.

The only other emancipation measure I propose is—

Second. That, by laws or resolutions, every legislative body in the whole United States should recognize the Colonization Society, and give it such countenance and aid as will enable it to carry out to full success its noble scheme of philanthropy. There never was an association of men more deserving of grateful acknowledgements. Comparatively few in numbers, and with limited means, they have effected what, in the difficult circumstances in which they have been placed, is an astonishment to the world. They have laid the foundation for a great nation, in a fertile country and a mild climate. For soil, water, and every other natural advantage, it is surpassed by none on the globe. They have prepared a *home* for our colored race; where they may be raised to the proper level of humanity, and, perhaps, perform the part of missionaries, in civilizing and christianizing cannibal Africa.

I have thus presented a sketch or outline of the mode in which emancipation *may* be effected, without violation of personal rights, or any coercive process; without cost, really, to the nation, and without any exercise of unconstitutional power.

My plan suggests several particulars worthy of note:

1. It asserts the great principle that no man can be *born* a slave; and that to place a helpless infant in that condition, from the mere accident of birth, is contrary to the laws of God and nature.

2. It proposes to extirpate a social evil, affecting the whole nation (at least by sympathies of humanity and sentiment), by the application of a common fund—the public lands—and through the constitutional action of the General Government.

3. It contemplates, as just and reasonable, that the owners of slaves, who yield them to the wishes of the country, and to a wise policy, shall be moderately compensated for their loss of property, out of the national domain.

4. It also secures, by the increased value of the alternate tracts of land reserved, a full reimbursement to the treasury of all the expenses incurred. I think that by this plan of settlement, through the interested activity of the owners of the "scrip" thus applied, the population of the country will advance in a regular way, without any hot-bed process; and that the tracts of land reserved by the government for subsequent sale will be worth more, eventually, than the *whole* could be sold for at present.

But—what is better than all else—it will, I think, bring us a *happy peace.* "Hard words, jealousies and fears," on this exciting subject, will no longer disturb; the present fratricidal strife will cease; mutual confidence and harmony between the North and the South will be restored; the internal trade between the great sections will be increased; general prosperity will follow, and the National glory be more advanced than it can ever be by *abolitionism* or wars of "secession."

These happy results I think will follow if the system I have thus proposed for the disposal and application of a portion of the public lands be adopted.

But, what is still more and better, the measures I have proposed I believe to be *right*, because they aim at *right ends* by *right means.*

I submit what I have presented, to the consideration of your honorable bodies, and pray the legislative action that may now be necessary to "*promote the general welfare*" in the matters to which I have referred.

TH. H. BAIRD.

JANUARY 1, 1863.

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